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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 798

W. D. YORK, *Petitioner*

v.

FLORIDA SOUTHERN CORPORATION, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, W. D. York, prays for a Writ of Certiorari to review the November 28, 1962 judgment of the Fifth Circuit.

CITATIONS TO OPINION BELOW

Although not officially reported, the Fifth Circuit opinion is in the Appendix p. 23-26 and is reported in 310 F. 2d 109. No opinion was written on Rehearing.

JURISDICTION

On November 28, 1962, the Judgment (Appendix p. 27); on December 14, 1962, the Petition for Rehearing (R. 209); on December 27, 1962, Denial of Rehearing (Appendix p. 29). 11 U.S.C. 47 and 28 U.S.C. 1254 grant jurisdiction.

QUESTIONS PRESENTED

1. Should the Chapter X Petition be dismissed for want of "good faith" as defined in 11 U.S.C. 546(3)?

2. Is the applicable standard whether or not the Debtor can reasonably be expected to successfully continue in business as held in *Fidelity Assurance Association v. Sims*, 318 U.S. 608, or the Fifth Circuit's suggested, new, enlarged standard of whether or not the value of the mortgaged property is substantially more than the mortgages?

3. Since the mortgage creditors must be affected, does their announced refusal to consent establish that "it is unreasonable to expect a plan of reorganization can be effected", as a matter of law?

4. Does the ambiguous, "bare bones" finding of a value "substantially more than the mortgages" justify the finding of a "reasonable expectation" of reorganization under the "clearly erroneous" standard of review?

5. Is the "good faith" finding "clearly erroneous", because (1) no evidence was offered to prove and no finding was made that the Debtor had a reasonable expectation of successfully continuing in

business, and the undisputed evidence establishes (a) the secured creditors will not consent to any plan of reorganization, (b) the Debtor has never operated successfully but has always lost money, and (c) the Debtor suggested no reasonable expectation of raising the equity capital necessary to continue in business?

6. Is "highly unrealistic", "incredible", and incompetent value testimony no evidence of a value "substantially more than the mortgages"?

STATUTES INVOLVED

The controlling statute is 52 Stat. 887, 11 U.S.C. 546(3):

> "Without limiting the generality of the meaning of the term 'good faith' a petition shall be deemed not to be filed in good faith if—
>
> . . .(3) it is unreasonable to expect that a plan of reorganization can be effected;"

STATEMENT

This is a Bankruptcy Reorganization, 11 U.S.C. 501, et seq. appeal challenging the "good faith" finding required by 11 U.S.C. 546(3). The District Court's jurisdiction is based on its well established bankruptcy jurisdiction.

The Debtor's primary assets are a hotel, hotel furnishings and an adjoining lot subdivision. Petitioner owns a second mortgage on these assets securing $600,000 which is subordinate to the Dania Bank's $1,100,000 first mortgage. Petitioner and the Dania Bank own 97% of the mortgage debt (R. 21).

The Debtor offered no evidence of any "good will", "going concern" value, or other valuable assets; moreover, *Debtor offered no evidence of its ability to "continue in business"; no finding of Debtor's ability to continue in business was made.*

Petitioner relies on the statutory "negative" definition, "not filed in good faith" (11 U.S.C. 546):

> "(3) it is unreasonable to expect that a plan of reorganization can be effected";

On undisputed facts, the Fifth Circuit found a reorganization "extremely unlikely", yet, nevertheless, clung to the notion that "extremely unlikely" fell short of an "unreasonable expectation" (Appendix p. 24):

> "Viewing the facts that are before us without dispute, it appears *extremely unlikely*, in light of the position taken by the appellant and by the holder of the $1,100,000 first mortgage that they will not consent to any reorganization plan, that a plan of reorganization can be effected.
>
> . . .
>
> "Nevertheless it is not the view we hold of the facts that is controlling, but it is the view of the trial court which prevails so long as it is not clearly erroneous." (Emphasis added)

While conceding a reorganization is "extremely unlikely" yet not "unlikely" enough to be "unreasonable to expect", the Fifth Circuit fails to state any plausible basis for expecting a successful reorganization. The suggested, tenuous distinction between "extremely unlikely" and "unreasonable expectation" makes of the law much

"too thin a dialectic enterprise". Petitioner submits (1) "extremely unlikely" is equal to or more than the Act's "unreasonable expectation", and (2) since reorganization is "extremely unlikely", "there is no reasonable expectation a plan can be effected".

The Debtor's Petition admits the secured debt must be affected (R. 8-9). The question is then squarely presented:

> **If the secured creditors must be affected, does their announced refusal to consent prove that "it is unreasonable to expect a plan of reorganization can be effected as a matter of law"?**

If the secured debt was not to be affected, quite another and different case would be presented.

HOLDING BELOW

Although the Fifth Circuit denounces the Debtor's value evidence as "highly unrealistic", "highly unrealistic" testimony, nevertheless, is held to sufficiently prove a "reasonable expectation" (Appendix p. 25).

> "Here there was evidence of value adduced upon examination *by appellant* of an official of the debtor corporation that the property had a value greatly in excess of the two mortgages. While appellant contends that this valuation is fantastic, and while we agree that it appears *'highly unrealistic'* in light of other testimony by competent appraisers, we cannot hold that the court's determination that the property was worth *'substantially more than the mort-*

> *gages*' is clearly erroneous, nor, in light of that fact, can we hold that the court's holding that the petition was filed in good faith was clearly erroneous." (Emphasis added)

Petitioner did not "adduce" the suggested value testimony, but the testimony was "adduced" by the Court (R. 77). Petitioner did not qualify the witness as an appraisal expert, but only offered him as an adverse witness on non-expert facts (R. 66-74); Petitioner's offer of the adverse witness did not make him an expert appraiser or any other kind of expert; the Court summarily attempted to qualify him as an "expert appraiser" and offered his testimony (R. 75-78); Petitioner only cross-examined him on his "expertise" and incredible values (R. 80-89).

This value finding ("substantially more than the mortgages") falls very short of finding bankruptcy solvency (the excess of assets over debts); a fortiori, the value finding does not prove any stockholder equity. Yet, the Fifth Circuit adopted its unreasonable measure of "reasonable expectation"—*" a property value substantially more than the mortgages"*. This conflicts with the standard of *Fidelity Assurance Association v. Sims*, 318 U.S. 608—*"reasonable expectation of successfully continuing in business"*. Petitioner submits the isolated finding of a property value "substantially more than the mortgages" does not spawn a reasonable inference that the Debtor's business may be successfully continued.

This new standard (value substantially more than the mortgage debt) raises these questions:

1. Is the "bare bones" finding of a value "substantially more than the mortgages" a reasonable basis for the finding of a "reasonable expectation of effecting a plan" required by 11 U.S.C. 546(3)?

2. Is "highly unrealistic" and "incredible" value testimony a reasonable evidentiary basis for the "reasonable expectation" finding required by 11 U.S.C. 546(3)?

This is the first reported case equating a value "substantially in excess of the mortgage debt" with a "reasonable expectation of effecting a reorganization". This novel equation is plainly wrong and an indirect repudiation of the *Sims*, 318 U.S. 608, requirement of *a reasonable expectation of successfully continuing in business*. The value-mortgage ratio is one thing, but successfully continuing the business is quite another and quite a different thing.

REASONS FOR GRANTING THE WRIT

(1) The Fifth Circuit erroneously applied its value standard for determining "reasonable expectancy" rather than the Sims, 318 U.S. 608, standard of a reasonable prospect for continuing in business — First, reliance on value to establish "reasonable expectation" misconceives the Chapter X function—i.e., continue the Debtor in business, if feasible. "Continuation in business" is the goal; "the ability to successfully continue in business" is the "benchmark". 6 *Collier on Bankruptcy* 3446 (Section 10.02):

> "A plan of reorganization, and indeed the whole reorganization process, envisions the maintenance of the going-concern values of the debtor. . . . It does mean that the business enterprise involved will, if

possible, be refurbished in some fashion so that it may continue to operate as a sound commercial and economic unit. . . ."

Even though the value is "substantially more than the mortgages", if the Debtor cannot prove a "reasonable expectancy" of successfully continuing in business, no reasonable expectation of a Chapter X plan exists, *Fidelity Assurance Association v. Sims*, 318 U.S. 609, 616; any excess value may be fully protected in bankruptcy or in a state court.

Since the mortgage creditors must be affected, and they refuse to agree to any plan, the value of the Debtor's property is immaterial. *In Re National Development Corporation*, 261 F. 2d 13 (C.A. 4):

> "Appellant contends here that two issues of fact were raised by the petition and the motion for *summary judgment*. First, it is pointed out that the parties are in vast disagreement as to the *value* of the property involved. The Court below felt, and we think correctly so, that *this is an immaterial issue since whatever the value of the assets, the refusal of appellee to agree to any plan of reorganization effectively bars reorganization.*" (Emphasis added)

The Fourth Circuit holding is in irreconcilable conflict with this Fifth Circuit holding:

> ". . . we cannot hold that the court's determination that the property was worth *substantially more than the mortgages* is clearly erroneous, nor, in light of that fact, can we hold that the court's holding that the petition was filed in good faith was clearly erroneous." (Emphasis added)

Under the same controlling circumstances, the Fourth Circuit held *value is immaterial*, while the Fifth holds the *relation of value to the mortgage debt is controlling*. This split in the Circuits should be promptly resolved.

The Fifth Circuit's standard, a value "substantially more than the mortgages", is manifestly unreasonable; it is the resurrection in another guise of the S.E.C.'s original notion that Chapter X contemplated "orderly liquidation" and was not limited to reorganizations to "continue in business". However, this notion was rejected in *Fidelity Assurance Association v. Sims*, 318 U.S. 608, as a misconception:

> "In the light of all relevant facts, it seems clear that Fidelity cannot be reorganized for the purpose of conducting its old business of selling investment certificates. . .
>
> There is no prospect that the debtor can be reorganized as an insurance company and the District Judge did not find that it could. . .
>
> Petitioners and Securities and Exchange Commission urge, however, that Chapter X may be employed to accomplish a slow and orderly liquidation which they say is imperative in the interest of all creditors. . .
>
> We conclude that, in this aspect, good faith, in the statutory sense, is lacking since no such reorganization as the statute was intended to accomplish is reasonably to be expected."

Sims, 318 U.S. 608, established the successful continuation of Debtor's business as the controlling standard; yet the Fifth Circuit ignores *Sims* in favor of its substitute standard—value "substantially more than the mortgage debt".

Yet, the finding of a value "substantially more than the mortgage debt" is an equivocal and timid finding at best; moreover, it is too uncertain to have any force. For example, the number of dollars equalling "substantially more" is undefined; yet, the value is less than enough to pay the entire secured debt or the unsecured debt; a fortiori, no stockholder equity is established. From the premise (value substantially more than the mortgages), it is a patent non-sequitur to deduce an ability "to successfully continue in business". This deduction arbitarily ignores the controlling questions, if the Sims, 318 U.S. 608, "continue in business" standard is applied, to-wit: (1) Where will the necessary equity capital come from? (2) What is the basis for concluding the Debtor can successfully continue in business by operating at a profit? (3) How will the Debtor pay its fixed expense? and (4) Why will the mortgage creditors change their minds and consent?

Since (1) the requisite secured creditors will not consent to any reorganization, (2) the "secured creditors" must be affected, and (3) Debtor offered no evidence of a reasonable expectation of continuing in business, the value finding is irrelevant. The critical inquiry is plainly the *reasonable expectancy of continuing in business* rather than the ratio of property value to the mortgage debt.

(2) The Debtor's value testimony is no evidence — In answer to Petitioner's suggestion of incredibility, the Fifth Circuit argues the value testimony is only "highly unrealistic" rather than incredible. "Highly unrealistic" equals incredible; the fine distinction drawn between "highly unrealistic" and "incredible" is illusory. This flies in the face of the realism guide established in Sims, 318 U.S. 608, 616:

> "As the court below has said, in applying the statutory test the situation should be viewed realistically."

The S.E.C.'s Fifth Circuit brief concedes the value testimony is "no evidence" (p. 9):

> "Such conflicting opinion testimony would not be adequate to support a definite or specific value for the Debtor's assets for purposes of a Chapter X plan."

The Debtor's only value witness was a reorganizer whose first and only, and perhaps his last, appraisal was on the witness stand (R. 80). No appraisal training, experience nor education was ever claimed, but, nevertheless, the witness appraised the subdivision lots at $7,500,000 (R. 84); he estimated the annual revenue from the lots at $100,000 (R. 79).

The witness's annual lot revenue estimate ($100,000) results in an investor recovering his $7,500,000 appraised value in seventy-five (75) years, if (1) no taxes are paid, and (2) the investor has no selling, maintenance nor administrative expense. This value and income testimony is plainly unreasonable and without probative force. The lot sales history from 1956 to 1962 of less than $54,000 total gross sale (less than $10,000 annually) (R. 174) exposes the witness's $100,000 annual revenue estimates as mere fanciful visions.

Moreover, the witness was not qualified, and his opinions, for this additional reason, have no probative force. No corroboration was offered. No wonder the Fifth Circuit found these values "highly unrealistic"; the distinction the Fifth Circuit makes between "highly unrealistic" and *unreasonable* is fanciful.

Debtor's sometime argument, even though continuation of the business is not a reasonable prospect Chapter X may prevent foreclosure, is devoid of merit. *In Re. National Development Corp.* 261 F. 2d 13 (C.A. 4); a fair assurance of successful continuance of the business is indispensable to a finding of "reasonable expectation", 318 U.S. 608. Since no evidence was offered of any prospect of continuing in business, the value finding is without force.

Neither of the lower courts found the Debtor can be rehabilitated to successfully continue in business; what is more, the Debtor and S.E.C. claim its ability to continue in business is not material to a determination of "reasonable expectancy".

(3) The Secured Creditors' refusal to consent establishes the statutory "unreasonable expectation" of 11 U.S.C. 546(3) — Petitioner holds a second mortgage securing the payment of a $600,000 note (R. 54). Petitioner is entitled to separate classification as a second lien creditor, *St. Louis Union Trust Co. v. Champion Shoe Machinery* 109 F. 2d 313 (C.A. 8).

Dania Bank has persistently refused to consent to any reorganization. The Dania Bank's refusal is plainly stated (R. 41):

> "The Dania Bank herewith affirmatively states that it will not accept but will specifically reject any plan which does not provide for immediate full cash payment to this mortgage holder of the full amount of all indebtedness owing to it."

The Petition concedes the necessity for materially affecting the secured debt (R. 8-9):

"The relief could not be had under arrangement of Chapter XI because such an arrangement would not *affect the claims of secured creditors and it is essential, for a proper reorganization of your petitioner that the rights of some secured creditors must be altered, modified or readjusted.*" (Emphasis added).

On the hearing, no evidence was offered to define how or what secured debt would be affected. No evidence of any creditor's support was offered; yet, more than 80% of the secured debt, 97% of the real estate mortgage debt, and Petitioner announced a refusal to accept any plan affecting their debt.

Without contradiction, the Trustee testified a debt of more than $1,100,000 could not be serviced (R. 115). Therefore, the Petitioner's lien and the first lien must necessarily be affected, i.e., paid by "fresh" capital, converted to equity or rearranged with extended maturities.

In Re, National Development Corporation, 261 F. 2d 13 (C.A. 4) affirmed a *summary judgment* holding want of "good faith" *as a matter of law*, because a non-consenting secured creditor would be affected. The law was correctly stated:

". . . Secondly, appellant argues that whether or not this petition was filed in good faith is a question of fact necessitating the taking of evidence. The same point was disposed of by this Court in *Area v. Russell Lumber Co. v. American National Bank & Trust Co.*, 201 F. 2d 508, 509 (C.A.4), a case strikingly similar to the case at bar:

'Petitioner complains that the District Judge did not set the case down for hearing and receive evidence bearing on the question of good faith; but there was

no occasion for such hearing when the determinative facts appeared from the face of the petition itself . . .'

"Under Sec. 179 of the Bankruptcy Act, 11 U.S. C.A., Sec. 579, in order for any plan of reorganization to be effected, at least two-thirds of *each affected class of creditors must agree to the plan*. Here, as shown by the petition, the only secured creditor is the appellee, who objects to any plan or reorganization. Appellant urges that at a full hearing, if one were afforded, the evidence might show that appellee's claim comes within one of the exceptions of Sec. 179 relating to creditors whose claims are *not* affected. But this is a specious argument, *for the petition states that the reason reorganiaztion is necessary is to reduce interest and amortization payments on this single secured debt and to extend the time of repayment*. Since it appears from the face of the petition that the secured debt will be materially unaffected, Section 179 is not applicable.

"It is irrefutably clear that appellee is a class of creditor in itself; that it would be adversely affected by any reorganization of the debtor; that it will not accept any plan of reorganization; and that it therefore follows that this petition cannot be prosecuted in good faith because, in the language of Sec. 146, 'it is unreasonable to expect that a plan of reorganization can be effected.' " (Emphasis added).

Petitioner is an adversely affected second mortgage creditor; Debtor did not deny nor offer any evidence that Debtor would not be affected. Debtor proposed no plan nor classification of secured creditors; Debtor simply hopes to coerce a composition of the secured debt. A "reasonable expectancy" of reorganization cannot be based on the Debtor's mere hope of coercing a composition. Composition is not contemplated by Chapter X. *Marine Harbor Properties, Inc. v Manufacturers Trust Co.*, 317 U. S. 78, 86.

The only possibility suggested for hoping a "reorganization can be effected" is the sterile argument that the secured creditors *may change their minds and ultimately consent.* This possible change of mind is so remote as to exist only in Respondent's imagination; this remote possibility may not reasonably be equated with a "reasonable expectation that a plan of reorganization can be effected".

The secured creditors' refusal to consent was held to establish "no reasonable expectation of effecting a plan" in *Arey & Russell Lumber Co. v. American National Bank & Trust Co.*, 201 F. 2d 508 (C.A. 4).

The Fifth Circuit's holding that (1) "substantial value in excess of the mortgages" is controlling, and (2) the refusal of the affected and secured creditors to consent is not controlling squarely conflicts with *In Re National Development Company*, 261 F. 2d 13 (C.A. 4), and *Arey & Russell Lumber Co. v. American National Bank & Trust Co.*, 201 F. 2d 508 (C.A. 4); this conflict should be resolved by exercise of the Court's supervisory powers.

Debtor's Petition is a coercive use of Chapter X for improper purposes—i.e., a composition or a manipulated liquidation. Petitioner's security is being depreciated by the first mortgage's interest and fees, as well as taxes and insurance, and (2) the Trustee's expense and large operating losses are being financed by first liens on the mortgaged property.

The "reorganizers" have not raised nor offered to pay any administrative expense or operating losses; this risk-less speculation at Petitioner's expense is a manifestly

unfair abuse of Chapter X which is not intended to be used as a coercive tool.

(4) The Debtor has never operated successfully but has always "lost money" — The Debtor admits these net losses:

1/31/60 to 10/31/60	$189,854.00
11/1/60 to 10/31/61	481,103.23
11/1/61 to 4/30/62	115,085.43

The hotel opened for business in January, 1960 and these losses include all except the first month's operation (R. p. 173). The Company's only revenue is from the hotel (including golf course, food, beverages, etc.) and the sale of subdivision lots. The history of income from lot sales is:

	From Inception to October 31, 1959	*Fiscal Year Ended October 31, 1960*	*1961*
Sales	None	$38,000	$30,300.00
Cost of Sales			15,181.60
			15,181.60

Since the lots were ready for sale in 1956, the total income from the sale of lots has been $53,318.00 (R. 173) —i.e., less than $10,000 per year. Lot sales cannot reasonably be expected to pay the Debtor's fixed expense, retire its debt, or provide the funds necessary for continuing in business.

Furthermore, the Trustee continues the operating losses; for the period from May 19 to July 31, 1962, the Trustee reported a loss (excluding unpaid administration expense) of $54,813.90 or $754.87 per day (R. 187). The "reorganizers" do not offer to bear these losses but seek to impose them on Petitioner by priority liens subordinating his security; this is plainly wrong.

(5) The Debtor offered no reasonable expectation of raising the necessary equity capital — The Trustee and Debtor admit additional equity capital of $1,600,000 was necessary to any reorganization (R. 114-117). The Debtor's failure to disclose any basis for raising equity capital or a "likely source" of financing falls very short of a fair assurance a reorganization can be effected.

For more than two years, the Debtor has urgently attempted to obtain financing. Financing may be equated with reorganization. As early as October 24, 1960, the Debtor employed an agent to obtain the necessary financing. The Debtor confirmed this long, unsuccessful search for financing (R. 72-74). The current need for financing is nothing new but is a logical extension of a long, unsolved, and for the Debtor, insoluble problem.

Janaf Shopping Center, Inc. v. Chase Manhattan Bank, 282 F. 2d 211 (C.A. 4), holds, since (1) equity capital was necessary, and (2) the Debtor did not offer any reasonable assurance of obtaining capital, the petition did not meet its "reasonable expectancy" burden:

> "The debtor contends that if given an opportunity to present a plan it might be able to interest investors to pay off the lienholders including holders of me-

chanic's liens. However, **nothing tangible has been presented that supports such a hope.** Despite the lapse of months while the parties were engaged in bitter controversy and the debtor was aware of the urgency of the situation, no prospective investor could be produced. The Massachuetts Mutual Life Insurance Company cannot be looked to for the permanent financing until the building plans have been fully carried out. . . .

"'We think it would be inequitable in the circumstances, and contrary to the letter and spirit of the estate, to permit speculation at the security holders' risk upon an expectancy vague and insubstantial.'" (Emphasis added)

The Fifth Circuit relied only on *Janaf Shopping Center, Inc. v. Chase Manhattan Bank*, supra, as authority for its "reasonable expectancy' holding in spite of *Chase Manhattan's* affirmance of a finding of "unreasonableness". The misplaced reliance on a holding of "unreasonableness" to support its contrary holding of "reasonableness" amply demonstrates neither reason nor authority justify the decision.

Since 1960 the Debtor has attempted to refinance; no suitable refinancing has been obtained; the Debtor's financial position has substantially deteriorated by large losses; no current working capital is available; no prospective equity or lending investor has been produced; no plan has been proposed at the time of the filing of this petition. Further prolonged speculation at Petitioner's expense upon undisclosed, vague and insubstantial expectancies is plainly contrary to the Chapter X purpose.

The Debtor concedes the urgent need for new capital, yet no fair assurance was given of how or from whom

the capital could be obtained; moreover, the Debtor renounced its clear duty to disclose the basis for any reasonable expectancy of obtaining new capital; this is the antithesis of "good faith" and falls very short of proving a "reasonable expectation that a plan can be effected".

Marine Harbor Properties, Inc. v. Manufacturers Trust Company, 317 U.S. 78, holds, if equity capital is required, a debtor's, as distinguished from a creditor's, reorganization petition is not filed with a "reasonable expectancy", unless the record proves the equity owner's desire to make a "fresh and fair" contribution:

> ". . . a plan or reorganization would not be fair and equitable which in such circumstances admitted the stockholders to participation, unless the stockholders made a fresh contribution in money or in money's worth in return for 'a participation reasonably equivalent to their contribution.' . . .
>
> "That rule obtains under Chapter X as well as under its predecessor, Sec. 77B. **There is no suggestion in the record that the equity owners desire to make a contribution on that basis and that unless they are allowed to do it under chapter X, they will be barred . . ." (Emphasis added)**

The equity owners offered no evidence of the ABILITY or the DESIRE to contribute the vital capital; since new capital is mandatory, no evidence of any reasonable expectation of obtaining capital establishes the Debtor's bad faith. See also *In Re Hunterbrook Building Corp.*, 276 F. 2d 190 (C.A. 2).

(6) Summary of reasons for granting the Writ — In a nutshell the reasons for granting the writ are:

1. The Fifth Circuit's decision that (1) the value "substantially more than the mortgages" is controlling, and (2) the affected secured creditors' refusal to consent is not controlling is in irreconcilable conflict with *In Re National Development Corporation*, 261 F. 2d 131 (C.A. 4), *Arey & Russell Lumber Co. v. American National Bank & Trust Co.*, 201 F. 2d 508 (C.A. 4), deciding that (1) the refusal of affected secured creditors to consent to any plan of reorganization "bars reorganization" and establishes the statutory "unreasonable expectancy" and (2) the value of the property is immaterial. The resolution of this conflict is a special and important reason for granting this writ.

2. Resolution of the conflict presents an important federal question—does the affected secured creditors' refusal to consent prove the statutory "unreasonably expectancy" — which has not been; but should be, settled by this Court.

3. The holding below that "reasonable expectancy" is established by the "bare bones" valuation ("substantially more than the mortgages" but not more than all the debt) with no evidence of any prospect for continuing in business is in conflict with *Fidelity Assurance Association v. Sims*, 318 U.S. 608, holding a reasonable expectation of "rehabilitation" as a going concern is the standard of "reasonable expectancy". The Fifth Circuit's substitute value-ratio standard conflicts with the *Sims* standard; this presents another special and important reason for

granting the writ, since the substituted standard should be examined in limits of *Sims* and the proper administration of Chapter X.

4. The decision that "valuation" in excess of the mortgage debt is evidence of the statutory "reasonable expectancy" is the resurrection in another guise of the S.E.C.'s early notion that Chapter X should be used for liquidation; this notion was rejected in *Sims*, 318 U.S. 608, holding liquidation is not within the ambit of Chapter X. This attempt to revive the use of Chapter X for liquidation calls for an exercise of this Court's power of supervision in order to assure the proper administration of Chapter X.

5. The undisputed evidence establishes "it is unreasonable to expect a plan can be effected". No evidence supports the "clearly erroneous" finding of "reasonable expectancy".

CONCLUSION

For the foregoing reasons, Petitioner submits the Petition for Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

A copy of this Petition has been served pursuant to Supreme Court Rule Number 33 by depositing two copies of this Brief in a United States Mail Box, with Airmail postage prepaid, addressed to:

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19867

W. D. YORK, *Appellant*,

versus

FLORIDA SOUTHERN CORPORATION, ET AL.,
Appellees

Appeal from the United States District Court for the Southern District of Florida

(November 28, 1962)

Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and JOHNSON, District Judge.

PER CURIAM: This is an appeal by the holder of a second mortgage for $600,000 from two orders of the district court denying his request that the debtor's voluntary petition for reorganization be dismissed for lack of good faith, as defined in Section 146(3) of Chapter X (11 U.S.C. § 546(3)). There having been a public subscription for the stock in the corporation, the Securities & Exchange Commission is a party to the proceedings, pursuant to Section 208 (11 U.S.C. § 608), and it filed its appearance by leave of court prior to the hearing below. The Securi-

ties & Exchange Commission supports the view of the appellees that the orders here involved did not constitute an abuse of the district court's discretion.

Viewing the facts that are before us without dispute, it appears extremely unlikely, in light of the position taken by the appellant and by the holder of the $1,100,000 first mortgage, that they will not consent to any reorganization plan, that a plan of reorganization can be effected. The term "good faith" as used in the Bankruptcy Act is not defined, but Section 146 (3), upon which appellant relies, provides that a petition shall be deemed "not to be filed in good faith if . . . it is unreasonable to expect that a plan of reorganization can be effected." Nevertheless it is not the view we hold of the facts that is controlling, but it is the view of the trial court which prevails so long as it is not clearly erroneous.

We do not believe that the fact, standing alone, that a class of secured creditors announces in advance that it will not agree to a reorganization plan makes it impossible for a Chapter X reorganization petition to be filed in "good faith." Cf *Arey and Russell Lumber Co. v. American National Bank and Trust Company*, 4 Cir., 201 F. 2d 508, In re *National Development Corp.*, 4 Cir., 261 F. 2d 13; but see *Janaf Shopping Center, Inc. v. Chase Manhattan Bank*, 4 Cir., 282 F. 2d 211, where the Court of Appeals for the Fourth Circuit said:

> "We need not in this case go so far as to predicate a finding of lack of good faith within the meaning of the statute upon the expressed opposition of the lien-holders. Such opposition is a

> factor to be weighed unless it is clear that the objecting creditors would not be affected by the plan, *but such opposition is not itself necessarily determinative of the question.*" (Emphasis added.)

Here there was evidence of value added upon examination by appellant of an official of the debtor corporation that the property had a value greatly in excess of the two mortgages. While appellant contends that this valuation is fantastic, and while we agree that it appears highly unrealistic in light of other testimony by competent appraisers, we cannot hold that the court's determination that the property was worth substantially more than the mortgages is clearly erroneous, nor, in light of that fact, can we hold that the court's holding that the petition was filed in good faith was clearly erroneous.

As pointed out cogently in the brief of the Securities & Exchange Commission, the fact that the trial court held against appellant on the good faith issue does not mean that the matter can be delayed indefinitely. In point of fact the debtor has now had from May 17th to date to attempt a reorganization. It may well be that when this case is demanded, which we think it should be without delaying it longer for a full scale opinion by this Court, the trial court may well find that any further delay would be unjustified. On the other hand the Court may find that a very short additional delay, to give the debtor an opportunity for the submission of a plan, may be warranted. In any event, as the trial court itself said:

> "This is a very desperate situation and only by quick action by the stockholders can it be saved."

We conclude that the most appropriate action we can take on the record before us is to permit a prompt determination whether a reorganization can be accomplished, and in default thereof to have the proceedings dismissed. The way to do this is to affirm the judgment of the trial court, which we do. In doing this we think it appropriate to suggest that the trial court expedite in every way possible its determination whether there is reasonable likelihood that a reorganization can be accomplished.

As no supersedeas was granted by the trial court, we assume that proceedings there have not been delayed pending this appeal. It is, therefore, not necessary for us to direct the judgment of this Court be sent down in advance of the normal period for the filing of a motion for rehearing.

The judgment is

AFFIRMED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By CLARA R. JAMES
Deputy
New Orleans, Louisiana Jan. 29, 1963

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19867

D. C. Docket No. 130-62-M-Bk.

W. D. YORK, *Appellant*,

versus

FLORIDA SOUTHERN CORPORATION, ET AL.,
Appellees

Appeal from the United States District Court for the Southern District of Florida

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Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and JOHNSON, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, W. D. York, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

November 28, 1962

Issued:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19867

W. D. YORK, *Appellant*,

versus

FLORIDA SOUTHERN CORPORATION, ET AL.,
Appellees

Appeal from the United States District Court for the Southern District of Florida

(December 27, 1962)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and JOHNSON, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.